



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFLG-PRO

8 Aug 97

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 97-40, Protest
Analyses for Second Quarter FY 97

1. The following statistics and information apply to GAO
protests filed in the second quarter of FY 97:

2Q97

Total protests filed in DA	86
Protests filed in FORSCOM	13

2. The following sustained protests provide some interesting
issues:

USACE:

Brazos Roofing Inc., (B-275113), 23 Jan 97. Brazos Roofing, responded by fax to a Savannah District IFB for hurricane damage repairs at Seymour Johnson AFB, NC. Due to the degree of urgency, the District required bid opening to be soon after it issued an amendment to the IFB. Therefore, the District verbally advised all prospective bidders that they could submit bids via fax and specified the official fax number. Brazos made several unsuccessful attempts to transmit its bid to the official fax machine on the day of bid opening, and finally called the District's official point of contact but was unable to reach him. After three or four calls, Brazos eventually reached a secretary who provided the firm with another fax number, to which Brazos sent its bid. At the same time, the District discovered that its official fax machine ran out of ink and decided to extend bid opening by half an hour to allow more bids to be received by fax. The Brazos bid, which was sent approximately an hour before bid opening, was not discovered on the other fax machine until immediately before bid opening and arrived late to the bid opening official. Although Brazos submitted the lowest bid, the District rejected it as untimely and awarded to the next low bidder. GAO sustained Brazos' protest, stating that the firm did

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SUBJECT: Contracting Information Letter (CIL) 97-40, Protest Analyses for Second Quarter FY 97

everything within its power to get its bid to the District on time, and that the government must bear some degree of responsibility for providing bidders a way to get their faxed bids to the bid opening official on time when the IFB allows for faxed bids.

Other MACOMs:

a. Safety Storage Inc., (B-275076). Protest was against an award to LAMCO Industries for six steel prefabricated storage sheds at Fort McClellan, AL. Safety alleged that the Army improperly accepted a late submission from LAMCO and otherwise waived the solicitation's specified floor and interior square footage requirements. The RFQ was for brand name or equal, small purchase procurement under FAR 13.103(g). The solicitation required the shed to have an interior square footage of 198 feet, a "uniformly distributed [floor] load [capacity] of 500 psf [pounds per square foot], and a 10-year structural warranty." The solicitation advised quoters of "equal, shed models to submit 'specifications sheets'" demonstrating compliance with the RFQ's purchase item description.

The Army found that the slight variation in Haz-Stor shed's interior square footage (2 feet) did not affect the suitability of the shed for its intended purpose of storing small quantities of petroleum products and related equipment. Safety failed to articulate how it would have altered its quotation had it known that slightly smaller interior storage area of 196 square feet would meet the Army's needs.

Ensure solicitations are specific in addressing only required salient characteristics; address each characteristic during the evaluation process, and ensure documentation for acceptance of other than brand name is fully documented in the file.

b. Alice Roofing & Sheet Metal Works, Inc., (B-275477). Alice Roofing protested the improper rejection of its bid as mathematically and materially unbalanced under an IFB for roofing repair and replacement at Fort Sam Houston, TX.

The solicitation listed 105 contract line items (CLINs). The KO's review of the bids showed that Alice Roofing submitted a unit price of 1 cent for each of 56 line items, raising the concern that the firm's bid might be unbalanced.

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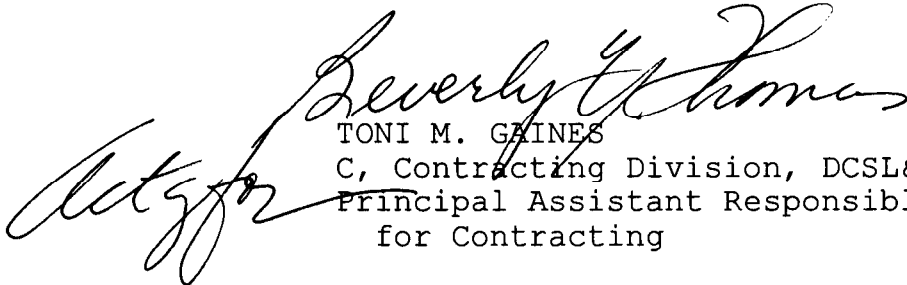
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The critical question in the determination of material unbalancing was whether the actual mix of line items ordered would involve a mix different from that set forth in the IFB's estimates, which could lead to the agency ordering proportionately less of the CLINs for which Alice Roofing bid nominal prices. If the mix of those CLINs was subject to significant variation, that variation creates reasonable doubt that Alice Roofing's bid would ultimately represent the lowest overall cost to the government. GAO determined the bid was not materially unbalanced.

3. Enclosures 1 thru 3 provide sustained protests involving security guards, hot noon meals, and janitorial services.

4. For additional information, please contact Irene Hamm,
DSN 367-5632 or email hammi@ftmcphsn-emh1.army.mil.

3 Encls


TONI M. GAINES
C, Contracting Division, DCSL&R
Principal Assistant Responsible
for Contracting

Premier Security
14 Jul 97
File: B-275908.2

DIGEST

Agency improperly awarded contract for security guard services to low bidder's successor in interest where, after bid opening and before award, the bidder was sold in its entirety, but the evidence in the record does not establish that, apart from the low bid, the assets transferred pursuant to the sale were of more than negligible value. Since the sale of the business thus was tantamount to the improper sale of the bid, low bidder's successor in interest may not receive award of the contract.

Premier Security protested the award of a contract to Lyons Security Service, Inc (LSSI) for unarmed guard services at the San Pedro Service Processing Center, California. Premier alleged improper award of the contract to LSSI, because, apart from its low bid, LSSI's assets were negligible, and thus, the sale of the business was tantamount to the improper sale of the bid.

Protest sustained

The IFB, issued as a small business set-aside, contemplated award of a firm fixed-price, requirements contract, for a base year and four option periods. Sixty firms, including LSSI and Premier, responded to the IFB. Bids ranged from \$25,598,235 to \$50,500,923. After rejection of several lower-priced bids as non-responsive, the KO informed LSSI it submitted the apparent low bid (\$29,769,313) and requested Defense Contract Management Command (DCMC) conduct a pre-award survey. On 31 Oct, DCMC recommended that LSSI not be awarded the contract based primarily on LSSI's weak financial condition. The DCMC report further noted that effective 1 Oct, after bid opening, LSSI had been sold to Kathleen E. Guidice, wife of the owner of United International Investigative Services (UIIS), which is the incumbent large business firm and therefore, ineligible to compete under the IFB.

After learning of the sale of LSSI, in a letter dated 4 Nov, the INS rejected LSSI's bid, citing FAR subpart 14.404-2(1), that states.. "After submitting a bid, if all of a bidder's assets or that part related to the bid are transferred during the period between the bid opening and the award, the transferee may not be able to take over the bid. Accordingly, the KO shall reject the bid unless the transfer is effected by merger, operation of law, or other means not barred by 41 USC 15 or 31 USC 3727." \1.

On 25 Nov, in response to an agency-level protest challenging the rejection, the KO reinstated LSSI as the low bidder. By this time, LSSI had incorporated and moved its offices to a new location at the same street address as UIIS. As a result of these events, and since the IFB was set aside for small businesses, the KO questioned whether LSSI remained eligible for award. Additionally, the KO was aware that LSSI's new owner was the wife of the owner of UIIS. The KO also questioned whether Ms Guidice's relationship to UIIS had any impact on LSSI's eligibility for award. Accordingly, by letter dated 19 Dec, the INS requested the SBA determine the awardee's business size status and eligibility for award.

On 24 Jan 97, the SBA determined that LSSI had properly self-certified that it was a small business as of bid opening.\2. The SBA also found that negotiations regarding the sale of LSSI had not been entered into prior to bid opening and that Ms Guidice was not the owner of LSSI as of bid opening. As such, the SBA concluded that any issues arising from Ms Guidice's relationship with Mr. Guidice or her affiliation with UIIS were not germane to its analysis.\3. Accordingly, the SBA found that LSSI was a small business eligible for award.

The DCMC then conducted a pre-award survey on LSSI at the firm's new address. The Defense Contract Audit Agency (DCAA) also audited LSSI's accounting system. Based primarily on LSSI's financial condition, DCMC concluded that the firm did not have the capital required to finance the start-up costs of the contract and recommended no award to LSSI. Further, based on perceived weaknesses in LSSI's accounting system and related internal control policies and procedures, DCAA concluded that LSSI's system was inadequate for the accumulation and reporting of costs under government requirements for progress payments, and questioned LSSI's ability to adequately support public vouchers. The KO then rejected the firm as non-responsible, and referred the matter to the SBA for consideration under the certificate of competency (CoC) procedures. On 28 Feb, the SBA issued a CoC to LSSI, and on 27 Mar, the INS awarded the contract to LSSI.

Following a debriefing by the agency, Premier filed this protest alleging that the award was improper because, apart from its low bid, LSSI had no assets to transfer to its new owner and, thus, the sale of the business was tantamount to the improper sale of the bid.\4.

DISCUSSION

The transfer or assignment of rights and obligations arising out of a bid or proposal is generally not permitted; exceptions to this general rule are allowed only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a merger, corporate reorganization, the sale of an entire business, or the sale of an entire portion of a business embraced by the bid or proposal. J.I. Case Co., B-239178, 6 Aug 90, 90-2 CPD ¶ 108 at 3; see FAR § 14.404-2(1). As with the anti-assignment statutes, 41 USC. § 15 and 31 USC. § 3727, which restrict the assignment of government contracts and claims, the restriction on the transfer of bids reflects a policy of ensuring the accountability of vendors to the government and of discouraging vendors from acquiring speculative interests in government contracts for the purpose of trading in them. See *Mil-Tech Sys Inc vs US*, 6 Cl Ct 26, 33-35 (Cl Ct 1984); *Ionics Inc*, B-211180, 13 Mar 84, 84-1 CPD ¶ 290 at 5. Because of these policy concerns, the exceptions to the general prohibition on the transfer of bids have been narrowly interpreted. Thus, we have found that a bid transfer could be improper where the bid was the primary asset being transferred, even where the transfer occurred as the result of a business combination that would arguably place the transfer within the scope of one of the exceptions to the rule; in those cases, we have examined whether the assets transferred, other than the bid, were of negligible value or purchased for nominal consideration, in which case the bid transfer would be improper. *J.I. Case Co*, supra, at 4; *Mil-Tech Sys Inc*, and *The Dept of The Army--Recon*, B-212385.4; B-212385.5, 18 Jun 84, 84-1 CPD 632 at 5-6; *Information Svc Indus*, B-187536, 15 Jun 77, 77-1 CPD 425 at 4.

Here, the protester did not dispute that LSSI was the complete successor in interest to LSSI. In this regard, the sale of LSSI was memorialized in a sales agreement entered into on 30 Sep 96, between Ms Guidice and Juanita L. Lyons, the sole proprietor of LSSI. Under the terms of that agreement, effective 1 Oct 96, in addition to assuming specified liabilities, Ms Guidice acquired all of the seller's rights, title, and interest in LSSI's assets, all equipment, licenses, inventory, accounts receivable, goodwill, trademarks, trade names, copyrights, and all other tangible and intangible assets owned by Ms Lyons. Subsequent to the sale, LSSI was incorporated under California law.

Premier contended that the award was improper because the value of the transferred assets, other than the low bid, was negligible. In this regard, Premier argued that the value of LSSI's assets should be viewed from the buyer's perspective,

which in Premier's opinion is UIIS, a large business which had little incentive other than the benefit of the low bid to acquire LSSI, whose assets were insignificant when compared to UIIS's.

The protester's suggestion that GAO compare Ms Guidice's assets or her financial interests in UIIS with LSSI's assets was misplaced. The test is not whether the transferred assets are comparable in value to the buyer's. Rather, the test is whether the negligible value of the assets or their nominal purchase price indicates that nothing of real value apart from the winning bid was transferred. Mil-Tech Sys Inc, and The Dept of The Army-Recon, supra, at 6. By examining certified financial statements, audited balance sheets, and other relevant, reliable evidence documenting the financial position of the firm being acquired (and excluding the value of the bid or proposal at issue), this test captured those cases where, for instance, although a transaction is described as a sale of an entire business, in actuality the transaction is tantamount to the improper assignment of a low bid or winning proposal. The GAO reviewed the documents prepared contemporaneously with the sale and other evidence in the record showing LSSI's financial position as of the time immediately preceding and leading up to the sale. The documents included an attachment to the sales agreement; the pre-award survey report DCMC initially prepared on LSSI explaining the firm's financial condition, including its assets, liabilities, and net worth; and information Ms Guidice submitted to DCMC during the pre-award survey of LSSI. Based on GAO's review, it determined the documents failed to establish that, apart from the low bid, the assets transferred pursuant to the sale were of more than negligible value.

Attachment to the Sales Agreement

The document, "EXHIBIT A, PURCHASE AGREEMENT OF LSSI SECURITY SERVICE," listed the assets transferred and liabilities assumed by Ms Guidice as a result of the sale. Under the main heading, "ASSETS ACQUIRED," the document listed "intangible assets" and "tangible assets." Intangible assets included fictitious business name, trademarks, logos and art, customer lists, goodwill, and business licenses, valued at \$101,585. Tangible assets listed included accounts receivable, office supplies, uniforms, two 1994 Toyota pickup trucks, a 1975 Jeep, five radios and a computer, with a total balance sheet value of \$104,330. This document also listed "LIABILITIES ASSUMED" by Ms Guidice totaling \$82,485.

The document was not dated or signed and was not accompanied by a narrative explanation of the basis or methodology used for assessing the value of the assets listed, raising serious questions about the values listed for some of the items. Most

importantly, the GAO questioned the basis for valuing the "intangible assets" at \$101,585. While intangible assets such as goodwill often can be of considerable value, there was no explanation or supporting evidence of any kind for the value listed for LSSI here.\5. In addition to the absence of any affirmative support, the valuation was inconsistent with the overall condition of the company. For example, DCMC's pre-award survey found that LSSI's current ratios (current assets/liabilities) and quick ratios (current assets less inventory/liabilities), which compared unfavorably to the industry averages, indicated excessive debt burdens and less income flow than desirable. DCMC's conclusion was further buttressed by comparing LSSI's 38.7 debt/net worth ratio to the industry average of 8.1, leading DCMC's evaluators to conclude that LSSI had very little equity available to discharge its debts in the event of a crisis. DCMC further noted that while by the end of 1995 LSSI had an equity of \$13,946, by Aug 96 that figure had slipped to \$3,362--LSSI's net worth as of 30 Sep 96, 1 day before the sale became effective. In short, although LSSI may have been a viable concern at one time, its business was clearly failing by the time of the sale.

Similarly with respect to tangible assets, there was nothing in the record to indicate whether these figures were based on audited balance sheets or certified financial statements prepared by an objective third party, disinterested in the transaction between Ms Guidice and Ms Lyons, raising serious questions as to their reliability and accuracy.\6. Even assuming that the total value of the tangible assets listed (\$104,330) was accurate, when adjusted by the total of liabilities assumed (\$82,485), and discounting the value listed for the intangible assets, the net result was that except for LSSI's winning bid, little of value was transferred to Ms Guidice as a result of the sale.

In sum, in the absence of a narrative explanation of the basis or methodology used to arrive at the values for the assets listed, and without the benefit of a current, audited balance sheet or a **certified** financial statement of LSSI, this document cannot reasonably be relied upon to conclude that the assets transferred were of more than negligible value.

Information Submitted During DCMC's Pre-award Survey, 31 Oct 96

In response to DCMC's request, Ms Guidice provided DCMC with a document entitled "COMPILED BALANCE SHEETS and STATEMENTS OF INCOME, Juanita L. Lyons [d/b/a] LSSI, 31 Aug 96 and 31 Dec 95. " For each period, the information contained on that document was divided into several categories and subcategories similar to the attachment to the purchase agreement discussed above.

A signed cover letter, dated 7 Oct 96, written on a certified public accountant's letterhead, accompanied this document. The letter explained that while the information was compiled in accordance with accepted accounting standards, a "compilation" is limited to presenting the information as represented by management. The signer expressly states that he had "not audited or reviewed the accompanying financial statements or other financial information and, accordingly, did not express an opinion or any other form of assurance on them." The letter went on to explain, that "[m]anagement elected to omit the statements of cash flows and all of the disclosures required by generally accepted accounting principles," which, if included in the compilation, "might influence the user's conclusions about the company's financial position..."

Given these disclaimers and conditions, the document submitted by Ms Guidice clearly did not constitute the kind of evidence--for example, certified financial statements or audited balance sheets--that could reasonably be relied on to establish the value of the company's assets. Even assuming that this document accurately reflected LSSI's financial position, it clearly supported a conclusion that--except for the low bid--nothing of significant value was transferred to Ms Guidice. For instance, as of 31 Aug 96, the latest reported period, the document listed "ASSETS," including current assets and property and equipment, valued at \$133,333 and total current and long-term liabilities as \$129,971, leaving a negligible net worth of only \$3,362--the value of the assets transferred as a result of the sale.

CONCLUSION AND RECOMMENDATION

Based on GAO's review, there was no reasonable basis in the record to conclude that the assets transferred pursuant to the sale were of more than negligible value. Since the sale of the business thus was tantamount to the improper sale of the bid, LSSI, the successor in interest, may not receive award of the contract. *Mil-Tech Sys Inc vs US*, 6 Cl. Ct. at 33-35; *Mil-Tech Sys Inc.*, and *The Dept of The Army--Recon*, supra.\7

The GAO recommended that the INS terminate the contract awarded to LSSI and award the contract to Premier, the next low bidder, if it were otherwise eligible for award. Additionally, GAO recommended that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 CFR 21.8(d)(1) (1997)

Protest sustained.

Comptroller General of the United States

NOTES

\1 41 U.S.C. § 15(a) (1994) provides in pertinent part:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States." 31 USC 3727 is the companion statute applicable to the assignment of claims.

\2 13 CFR 121.404 (1997) generally provides that SBA determines the size status of a concern as of the date of its written self-certification as a small business. See also FAR 19.301(a) (FAC 90-32); Vantex Svc Corp, B-251102, 10 Mar 93, 93-1 CPD ¶ 221 at 2.

\3 Subsequently, in connection with a different procurement, SBA concluded that LSSI was not a small business concern. On 30 Oct 96, the GSA issued solicitation No. GS-11P96-MPC-0512 as a small business set-aside for security guard services at Crystal Plaza #6, in Arlington, VA. UIIS was the incumbent providing those guard services. On 27 Nov, in response to GSA's solicitation, LSSI self-certified that it was a small business concern and GSA's KO questioned that certification. After analyzing several factors concerning affiliation, including LSSI's and UIIS's common interests, their respective ownership, and office location, on 10 Mar 97, the SBA determined that LSSI was not a small business concern eligible for award under GSA's solicitation. This result is consistent with SBA's regulations, since LSSI self-certified that it was a small business concern after Ms Guidice had acquired LSSI.

\4 In its protest, Premier also argued that the INS "failed to evaluate proposals in accordance with the stated evaluation scheme." However, the INS conducted the procurement using the sealed bid procedures prescribed in FAR part 14, which generally require that award be made to the responsible bidder whose responsive bid is deemed to be most advantageous to the government, considering only price and price-related factors. FAR 14.408-1(a). Consequently, except for calculating total price (including options), and determining that LSSI's bid was responsive, the INS did not "evaluate proposals" as that concept

is applied in negotiated procurements. Premier also maintained that in issuing a CoC to LSSI, the SBA improperly disregarded vital information bearing on LSSI's responsibility. In its comments on the agency report, Premier withdrew this allegation. Premier further argued that the awardee's bid failed to satisfy definitive responsibility criteria in the IFB.

\5 The GAO noted that the "balance sheets and statements of income" submitted to DCMC during the pre-award survey, discussed further below, make no reference to any intangible assets, casting further doubt on the reliability of the valuation in the attachment to the purchase agreement.

\6 Interestingly, the bottom margin of all pages of the sales agreement contain what appear to be the hand-written initials of the seller ("J.L." for Juanita Lyons) and the purchaser ("K.G." for Kathleen Guidice), indicating their acknowledgment of the terms and conditions contained in the agreement. This attachment, however, which was presumably prepared contemporaneously with the sales agreement, contains two spaces at the bottom of the page marked "INT: INT: " for the parties to initial. However, both of these spaces are blank, suggesting that the parties either did not agree as to its contents or its accuracy, or that neither party intended for it to be part of the transaction.

\7 The GAO decision in Mil-Tech was issued in response to a request from the US Claims Court. Mil-Tech filed suit in the Claims Court seeking to bar the contracting agency from making award to another bidder, following two decisions by GAO concluding that Mil-Tech was eligible for award. In the cited decision, GAO concluded that Mil-Tech was not eligible for award because the sale of its stock to another company essentially constituted a prohibited bid transfer. In considering this issue, the Claims Court reached the same conclusion.

Executive Conference Center, Inc dba Holiday Inn-Atlanta Central
File: B-275882.2
Date: 10 Apr 97

DIGEST

An amendment to the statement of work (SOW) in a solicitation that specified the food transportation equipment the contractor is to use to transport meals to a military entrance processing station is material where it imposes additional obligations on the contractor to protect the food from contamination that were not required in the invitation for bids as issued or already imposed by applicable state and local food safety regulations.

DECISION

Executive Conference Center, Inc. d/b/a Holiday Inn-Atlanta Central protested the Army's decision to terminate instant contract award and proposed to award to Ashok Kumar d/b/a Hotel Castlegate Howard Johnson Midtown, under an IFB to provide lunch (noon) meals for Military Entrance Processing Stations (MEPS) applicants at the Atlanta MEPS.

Protest sustained. \1

Fort Knox DOC issued the IFB on 20 Nov 96, and did not authorize facsimile bids in the IFB. The IFB contemplated the award of a firm, fixed-price, requirements contract for a base and four option years.

The SOW specified "...that the contractor shall provide meals consisting of submarine sandwiches with potato chips and a beverage to the MEPS, which has a government-furnished dining and serving area..." The SOW specified that the sandwiches could be on either white or whole wheat submarine-style bread, with a choice of sliced ham (baked or boiled), turkey, or roast beef, a choice of sliced swiss, provolone, or american cheese, and served with fresh sliced tomatoes and fresh shredded lettuce. Besides canned soft drinks, the contractor is to provide ice water, iced tea (10 oz. cup) and whole milk (half pint) upon request. The contractor will also provide disposable plates, knives, forks, spoons, cups, etc. with the meals as well as various condiments, including catsup, mustard, mayonnaise, pickles, relish, onions, salt and pepper, and oil and vinegar.

The IFB stated that no food preparation facility was available at the MEPS and that the contractor's food preparation facility must be within 18 miles of the MEPS in order to be considered for award. The bid schedule requested unit and extended prices based on an estimated quantity of 13,450 meals for the base period and

each option year, with award to be made based on the aggregate amount. The contractor was to perform in accordance with written delivery orders issued by the contracting activity. The IFB scheduled bid opening for 11:00 am on 20 Dec 96, and required bidders to return an original signed copy of the completed bid.

On 10 Dec 96, the Army issued Amendment 0001 and indicated that the hour and date specified in the IFB for bid opening had not been extended. The amendment deleted paragraphs of the SOW requiring medical examinations for food handlers and paragraphs relating to the dining and serving areas. The amendment also added the following new paragraphs to the SOW:

"5.1.1.7.5 FOOD TRANSPORTATION EQUIPMENT. In those cases where the contract calls for the preparation of food at the contractor's facility and the serving of food at the MEPS site, the following equipment shall be used when transporting food."

"5.1.1.7.5.1 Insulated and hermetically sealed food containers shall be used to transport hot food items and perishable food items.

"5.1.1.7.5.2 All other food items shall be transported in closed containers to protect food from contamination."

"5.1.1.7.5.3 Enclosed and clean vehicles shall be used for the transportation of food."

"5.1.1.7.5.4 Vehicles used to transport food shall meet all federal, state and local health, safety, licensing and insurance requirements."

The pre-printed language on the amendment form required that offerors acknowledge receipt of the amendment prior to the hour and date specified in the solicitation by one of the following methods: (a) by completing and signing the form and returning a copy of the amendment; (b) by acknowledging receipt on each copy of the offer submitted, or (c) by separate letter or telegram that includes a reference to the solicitation and amendment numbers. The form warned bidders that "FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER."

On 17 Dec, Howard Johnson's agent asked the contracting officer whether any amendments had been issued and was told that an amendment had been mailed to the firms, including the agent, on the bidders' list. The Howard Johnson's agent had not received the amendment, but arranged for overnight delivery of another copy of the amendment. It arrived the following day. The agent

then transmitted Howard Johnson's acknowledgment of the amendment--a completed signed copy of the SF 30--by facsimile to the contracting office prior to bid opening. On the facsimile transmission cover sheet to the contracting office, Howard Johnson's agent explained that the acknowledgment was being transmitted by facsimile because Howard Johnson's bid had already been mailed and the amendment "may be a material modification." At the 20 Dec bid opening, Howard Johnson was the low bidder. The bid opening officer noted on the abstract of offers that Howard Johnson acknowledged the amendment by facsimile. Holiday Inn was the second low bidder and acknowledged the amendment by returning a completed signed original copy of the amendment with its bid. Both Howard Johnson and Holiday Inn indicated in their bids that their respective food preparation facilities were located within 18 miles of the MEPS, as required.

Because Howard Johnson had acknowledged the amendment via facsimile transmission, which was not an authorized means of acknowledgment under the IFB, the contracting officer concluded that the facsimile transmission did not constitute acknowledgment of the amendment. The contracting officer rejected Howard Johnson's bid as non-responsive on 31 Dec, and made award to Holiday Inn. Howard Johnson protested on 3 Jan 97, contending that the amendment was not material since it did not have an impact on the bidders' prices and, even if the amendment were material, its acknowledgment of the amendment by facsimile transmission was proper under the circumstances.\2

In considering Howard Johnson's protest, the contracting officer concluded that the amendment was not material. The contracting officer noted that the amendment relaxed the SOW requirement for medical examinations for food handlers and deleted certain SOW paragraphs relating to the dining and serving areas as irrelevant because the government was furnishing the dining facility and the contractor was merely providing submarine sandwiches, chips, and beverages, as described above.

Regarding paragraph 5.1.1.7.5.1 added by the amendment, that required insulated and hermetically sealed food containers be used to transport hot food items and perishable food items, the contracting officer discovered, after Howard Johnson filed a protest, that the applicable state and local food safety regulations, GA. Comp. R&Regs. r. 290-5-14-.03 (1) (c) (96); Fulton County Code 30-2-2-5(1) (A) (91), prohibits the use of food in hermetically sealed containers\3 that were not prepared in a food processing establishment.\4 The contracting officer thus viewed the specification requirement as unenforceable and determined that the other requirements of the paragraph 5.1.1.7.5.1 were not material because the SOW does not call for the serving of hot foods, and because the contractor was already

required by the state and local food safety regulations to ensure the safety of perishable food items.

The contracting officer also determined that the requirements of paragraph 5.1.1.7.5.2, "that all other food items be transported in closed containers to protect food from contamination, and paragraph 5.1.1.7.5.3, that enclosed and clean vehicles be used for the transportation of food...", were not material because the contractor is obligated by the state and local food safety regulations to protect food from contamination and spoilage during transportation, such as by wrapping or packaging the food, and thus these paragraphs added by the amendment do not impose any additional obligation on the contractor.

Since the contracting officer determined that the amendment was not material, the contracting officer decided to waive Howard Johnson's failure to properly acknowledge the amendment as a minor informality pursuant to FAR subpart 14.405(d) (2), which provides that a bidder's failure to acknowledge receipt of an amendment to an invitation for bids shall be waived if the amendment involves only a matter of form or has either no effect or merely a negligible effect on price, quantity, quality, or delivery of the item bid upon.

On 3 Feb, the contracting officer informed Howard Johnson's agent that it would "set aside" the award of the contract to Holiday Inn effective 9 Feb and award the contract to Howard Johnson effective 10 Feb. As a result, on 4 Feb, Howard Johnson withdrew its protest.

On 6 Feb, Holiday Inn filed its protest to GAO, contending that because the IFB did not permit acknowledgment of the amendment by facsimile and that the amendment was material, Howard Johnson's bid was properly rejected in the first place and the contract award should be reinstated to Holiday Inn.

A bid that does not include an acknowledgment of a material amendment to an IFB must be rejected as non-responsive because, absent such an acknowledgment, the bid does not obligate the bidder to comply with the terms of the amendment. Eagle Constr Svc, Inc, B-257841, 10 Nov 94, 94-2 CPD ¶ 181 at 2-3. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, G. R. Sponaugle & Sons, Inc, B-257784, 7 Nov 94, 94 CPD ¶ 178 at 2, or if it would have more than a negligible impact on price, quantity, quality, or delivery of the item bid upon, or the relative standing of the bidders. See FAR part 14.405(d) (2); L&R Rail Svc, B-256341, 10 Jun 94, 94-1 CPD ¶ 356 at 4. A bidder's failure to acknowledge receipt of an amendment that is material is not waivable as a minor informality. Specialty

Contractors, Inc., B-258451, 24 Jan 95, 95-1 CPD ¶ 38 at 2. No precise rule exists to determine whether a change required by an amendment is more than negligible; rather, that determination is based on the facts of each case. Coopers Constr., Inc., B-260364; B-260364.2, May 30, 1995, 95-1 CPD ¶ 268 at 3.

The GAO thought the amendment was material because it imposed new obligations on the contractor that did not exist in the IFB as issued, such as transporting the food in closed containers, as required by paragraph 5.1.1.7.5.2 of the amendment, and in an enclosed vehicle, as required by paragraph 5.1.1.7.5.3. While, as asserted by the Army, the contractor was obligated by the state and local food safety regulations to protect transported food from contamination, the contractor is not already so obligated by the state and local food safety regulations to transport food items in closed containers. Rather, the state and local regulations permit the contractor to instead completely wrap or package food that is being transported as an alternative to using covered containers. Ga. Comp. R&Regs. r. 290-5-14-.03(6) (a) (96); Fulton County Code § 30-2-2-5(3) (N) (91) .\5 Further, the Army has not pointed to any applicable law or regulation that already obligates a contractor that is a "Food Service Establishment" to transport the food in an enclosed vehicle. As these additional obligations were of obvious importance to the Army at the time the amendment was issued in establishing what the Army thought should be the minimum standards for food transportation and the acceptable methods of such transportation by the contractor, standards that are stricter than the contractor was already obligated to provide to protect the food from contamination, the amendment was material.\6 See Anacomp, Inc., B-256788, 27 Jul 94, 94-2 CPD ¶ 44 at 3.

Since Howard Johnson did not acknowledge the amendment, Howard Johnson's bid does not represent a clear commitment by that firm to transport food items in accordance with the material SOW requirements added by the amendment, and, accordingly, the Army should not have waived Howard Johnson's failure to acknowledge the amendment as a minor informality but should have rejected the firm's bid as non-responsive.

Ordinarily, we would recommend that award be made to Holiday Inn as the low responsive bidder. However, it appears from the Army's eventual acceptance of Howard Johnson's bid that the additional obligations imposed by the amendment may overstate the needs of the government, and that the contractor's compliance with existing state and local food safety regulations may be sufficient for meeting the agency's needs. In addition, it is also apparent that the IFB, as amended by the addition of paragraph 5.1.1.7.5.1, is defective in requiring the contractor

to use hermetically sealed containers that the contractor is prohibited from doing by state and local food safety regulations.

Accordingly, we recommend that the Army cancel the IFB and resolicit on the basis of an SOW that accurately reflects the Army's needs. Bid Protest Regulations, 4 CFR 21.8(a); see West Alabama Remodeling, Inc.1 B-220574, 26 Dec 85, 85-2 CPD ¶ 718 at 2-3, aff'd B-220574.2, 7 Feb 86, 86-1 CPD ¶ 141 at 2. We also recommend that Holiday Inn be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 CFR 21.8(d) (1). Holiday Inn's claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 60 days after receipt of this decision. Bid Protest Regulations, 4 CFR 21.8(f) (1).

Protest sustained

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\1 This decision is made under our express option procedures, Bid Protest Regulations, 4 CFR 21.10 (1997).

\2 Howard Johnson argues that it properly acknowledged Amendment 0001 by facsimile because it essentially complied with the pre-printed acknowledgment instructions on the SF 30 by completing and signing the form and "returning" a copy of the amendment before the hour and date specified for bid opening. However, we have consistently recognized that where, as here, the IFB did not authorize the submission of facsimile bids or the acknowledgment of amendments by facsimile, a facsimile transmission does not constitute acknowledgment of the amendment. The Hackney Group, B-261241, 5 Sep 95, 95-2 CPD ¶ 100 at 4; Recreonics Corp, B-246339, 2 Mar 92, 92-1 CPD ¶ 249 at 3 recon denied, B-246339.2, 15 Jul 92, 92-2 CPD ¶ 23.

\3 The state regulation defines a "Hermetically Sealed Container" as "a container designed and intended to be secure against the entry of micro-organisms and to maintain the commercial sterility of its content after processing." Ga. Comp. R&Regs r. 290-5-14-.01(o) (96).

\4 It does not appear that either bidder qualifies as a "Food-Processing Establishment," which is defined as "a commercial establishment in which food is manufactured or packaged for human consumption," but are rather considered "Food Service Establishments," that prepare and serve meals, including sandwiches. Ga. Comp. R&Regs r. 290-5-14-.01(l) and (m) (96).

\5 The state regulation provides that "[d]uring transportation, food and food utensils shall be kept in covered containers or completely wrapped or packaged so as to be protected from contamination and spoilage." (Emphasis added.) The local regulation uses almost identical language. \6 For example, without acknowledging the amendment and thus being obligated to transport the food in closed containers and in an enclosed and clean vehicle, the contractor could instead load wrapped or packaged food in the open back of a pick-up truck for transportation to the MEPS. It is apparent that the requirements added to the SOW by the amendment specifying closed containers and enclosed vehicles could have had a more than negligible impact on price under this very close price competition.

\7 Holiday Inn states that it "bought insulated, and hermetically sealed food containers, sleeved containers, and other equipment in order to be in compliance with the requirements of the amendment."

Trident Maintenance Inc.
B-275891
12 Mar 97

DIGEST

In a sealed bid procurement for janitorial and related services for a federal building, the contracting agency improperly calculated the protester's and awardee's bid prices for estimated quantities of services where the agency treated the firms' prices per 1,000 square feet for certain contract line items as prices per square foot, which had the result of substantially inflating and skewing the firms' total bid prices.

DECISION

Trident Maintenance Inc., protested the award of a contract to Alaska Lee's Inc., under an IFB issued by GSA for janitorial and related services. Trident contended that under a proper bid price calculation its bid was lower priced than Alaska Lee's.

Protest sustained.

The IFB provided for the award of a contract for janitorial and related services for a base and four option years. Building information was provided that informed bidders of, among other things, the building's gross area (51,681 SF), occupiable area (24,324 SF), bare office flooring (2,258 SF), and carpeted office area (11,679 SF). The solicitation's schedule of supplies or services and prices requested that bidders provide their price per month for the base and option years to perform the "basic services" and to also provide their prices for various quantities (per 1,000 SF) for some services, and per job, per blind, and per hour for other services) of specified "other contract services." Bidders were informed by section M that the agency would use the following formula to evaluate bid prices:\1

Basic Services:

Monthly price X 12

"(Note: The square footages are divided by 1000. That result will be multiplied by an estimate of the number of times the service might be used. The same will hold true for Blind and Window Washing.)"

Other Contract Services:

Floor Maintenance Services (Office) Stripping & Refinishing:
/1000 SF X 2,258 X SF price; Stripping & Sealing: /1000 SF X
2,258 X SF price; Carpet Cleaning: /1000 SF X 11,679 X SF price.

Floor Maintenance Services (Corridors) Stripping & Refinishing:
/1000 SF X 5,327 X SF price; Stripping & Sealing: /1000 SF X
5,327 X SF price; Carpet Cleaning: /1000 SF X 83 X SF price.

Scrub and rinse loading docks, platforms, trash rooms, garage
ramps, and driveways: /1000 SF X 630 X SF price.

High Cleaning: /1000 SF X 0 SF price.

Wash Blinds: /Blind X 253 Blinds price.

Window Washing: /Job X 1 Job price.

Snow Removal: /Hour X 0 Hours price.

GSA received six bids by the bid opening date. Trident's and
Alaska Lee's provided the following bid prices:\2

Trident Alaska Lee's Basic Services: Total Price (base and option
years): \$186,431 \$179,400

Other Contract Services: (base and option years)

Floor Maintenance Services (Offices) Stripping & Refinishing \$70
= .06 SF; Stripping & Sealing \$70 = .06 SF; Carpet Cleaning \$55 =
.06 SF

Floor Maintenance Services (Corridors) Stripping & Refinishing
\$70 = .06 SF; Stripping & Sealing \$70 = .05 SF; Carpet Cleaning
\$55 = .06 SF

Scrub and rinse loading docks, etc., \$50 = .04 SF

High Cleaning \$60 = .02 SF

Wash Blinds \$3 - \$19

Window Washing \$225 - \$650

Snow Removal \$40 - \$70

In evaluating bid prices, GSA converted Alaska Lee's price per SF
to a price per 1,000 SF; for example, Alaska's Lee's bid price of
.06 per SF for stripping and refinishing office floors was
converted to \$60 per 1,000 SF. GSA then multiplied Trident's and
Alaska Lee's bid prices per 1,000 SF for the various floor

maintenance services, scrubbing and rinsing of loading docks, and high clearing line items against the solicitation's stated estimated quantities. Using this calculation, GSA determined that Alaska Lee's had submitted the lowest total bid price of \$8,145,935 and that Trident had submitted the second lowest total bid price of \$8,892,890. Award was made to Alaska Lee's, and this protest followed. Performance was stayed pending decision.

Trident contended that GSA misapplied the IFB evaluation formula in calculating the bidders' total bid prices. Specifically, Trident complains that GSA treated Trident's and Alaska Lee's prices per 1,000 SF for the floor maintenance services, scrubbing and rinsing of loading docks, and high clearing line items as prices per SF, which skewed the calculation of the total bid prices. Trident asserted that under a proper bid price evaluation, its bid price is lower than Alaska Lee's. GAO agreed.

GSA replied that the IFB requested bid prices per 1,000 SF for the floor maintenance services, scrubbing and rinsing of loading docks, and high clearing line items, and that inclusion of the symbol "/" in the formula meant "per." However, GSA did not explain why this required the agency to treat bidders' prices per 1,000 SF as prices per SF in performing the calculation; thereby, resulting in a substantial (1,000 fold) increase in the government's stated estimated quantities for these line items and in a vastly inflated and skewed total bid price.

The IFB did not provide for such a calculation, as the agency suggests; nor would such a calculation be reasonable.\3 The only reasonable reading of the solicitation was that in determining the bid prices, bid prices per 1,000 SF for the floor maintenance services, scrubbing and rinsing of loading docks, and high clearing line items would be applied against the appropriate estimated quantities for those services.\4 In this regard, IFBs whose evaluation schemes do not evaluate bids against the total or actual work to be performed, or a reasonable estimate of the work to be performed, fail to ensure the selection of the lowest cost bidder and are defective. See Southeastern Servs., Inc., and Worldwide Servs., Inc., 56 Comp. Gen. 668 (1977), 77-1 CPD ¶ 390; Chemical Technology, Inc., B-187940, 22 Feb. 22, 77, 77-1 CPD ¶ 126.

The GAO recalculated Trident's and Alaska Lee's total bid prices by determining a price per SF for the floor maintenance services, scrubbing and rinsing of loading docks, and high clearing line items and multiplying that price per SF against the stated estimated quantities. Based upon their calculation of the firms' bid prices, GAO found that Trident submitted the lowest total bid price of \$200,053 for the base and four option years and Alaska

Lee's submitted the second low bid price of \$214,624.25.\5 Based on this calculation, Trident appeared to be entitled to award as bidder submitting the lowest total bid price.

The GAO recommended that the contract awarded to Alaska Lee's be terminated for the convenience of the government and award made to Trident, if that firm is otherwise found eligible for award. They also recommend that Trident be reimbursed its reasonable costs of filing and pursuing the protest.

Comptroller General of the United States

NOTES

\1 This same formula was repeated for the four option years. The total evaluated bid price was the sum of the base year and option year prices.

\2 GAO calculated that none of the other bids could be considered low.

\3 As quoted above, there was a note in the formula stating that "square footages are divided by 1000" and "that result will be multiplied by an estimate." This indecipherable note, which the agency has not sought to explain, provides no support for GSA's calculations.

\4 While the IFB did not specifically identify the mathematical calculation that would be performed to determine what a bidder's price to perform the service would be, a number of different calculations could be performed to properly determine the bidder's total evaluated bid price. For example, bidders' prices per SF could be determined by dividing the bidders' prices per 1,000 SF by 1,000, as the protester suggests, or a bidder's price per 1,000 SF could be multiplied against the product of the stated estimated quantity divided by 1,000.

\5 The price calculation resulted in a total, five year contract price that was consistent with the total price paid under the incumbent contract for basically the same services. Specifically, the IFB stated that the incumbent contractor was being paid \$3,715.40 per month, which would result in a total contract price of \$222,924 for five years.